IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC .HH5
MC 86/2021

In the matter between

VETIVERT TECH (PTY) LIMITED **Petitioner**
(rep. by Bernard George)

and

COMPLETE ENERGY SOLUTIONS LIMITED **Respondent**
(rep. by Alexandra Benoiton)

Neutral Citation	*Vetivert Tech (Pty) Limited v Complete Energy Solutions Limited* (MA 298 of 2021 arising in MC 31 of 2021) SCSC HH5 delivered on 13 June 2023 2021
Before:	Vidot J
Summary	Application for validation of attachment of an arbitral award given by the Dubai International Arbitration Centre (DIAC) in terms with articles 146 and 150 of the Commercial Code. The applicability of the New York Convention in Seychelles; when did the Convention become enforceable in Seychelles; Article 64 of the Seychelles Constitution. Enforcement of a judgment debt adjudicated upon by the DIAC, over moneys in the hand of a third party.
Heard:	Counsels filed written submission
Delivered:	13 June 2023

RULING

VIDOT J

The Application

[1] Vetivert Tech (Proprietary) Limited (hereafter "Vetivert' has filed an application in terms with section 227 of the Seychelles Code of Civil Procedure ("SCCP"), Articles 146 and

148 of the Commercial Code ("CC") and Article IV of the New York Convention ("the Convention") for attachments of sums due under an arbitral award.

[2] Vetivert is the recipient of an arbitral award delivered by the Dubai International Arbitration Centre ("DIAC) for a total sum of US$236, 970.49. This is confirmed in the Final Award dated 14th January 2021 attached to the Application. Vetivert alleges that the arbitration was held pursuant to a valid arbitration agreement. This is to be found in the Consortium Agreement dated 25th July 2017.

[3] On 03rd May 2020, the Seychelles acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Award with two reservations, namely; (i) that the Seychelles will apply the convention only to recognition of enforcement of awards made in the territory of another contracting state, and (ii) that the Seychelles will apply the convention only to differences arising out of legal relationships that are considered commercial under the national law of Seychelles. The United Arab Emirates is a signatory of the Convention. Therefore, Vetivert avers that in terms with the Convention, the award is a Convention award.

[4] Vetivert further avers that in terms with Article 148 of the CC, the award obtained under the Convention shall be recognised as binding and shall be enforced in accordance with the rules of procedure in Seychelles.

[5] Vetivert further claims that Complete Energy Solution Limited ("CESL") is due sums in excess of the award sum by Public Utilities Corporation ("PUC") arising from the construction of a 5MW PV Plant, on Romanville Island, Seychelles.

[6] Wherefore, Vetivert applies for an order for validation of attachment of moneys due to Vetivert in hands of PUC.

The Objection

[7] Counsel for CESL submits that the objections raised are on the law as put forth in the affidavit of Objections by Yasser Elshazly who affirms that he is authorised in his capacity as director of CESL to make such affirmations.

[8] Mr. Elshazly states that the application is bad in law, invalid and ought to be struck out on the following grounds;

i. The application has been commenced by the wrong procedure and/or has not been made in accordance with the rules of procedure for the enforcement of the arbitral award in Seychelles;

ii. The application is wrong in law as it is incomplete and unsupported by an affidavit;

iii. The documents attached to the Application has not been validly authenticated or certified and cannot be relied upon by the Court; and

iv. That the application is made under Article 148 of the Commercial Code of the Seychelles

[9] CESL further states that the DIAC improperly assumed jurisdiction in this matter and that the arbitrators had no jurisdiction to hear this matter in that the only binding agreement included specific scope of works with associated cost between the parties was the agreement for Vetivert local presence under a limited notice to proceed agreement ("the LNTP Agreement) which provided for disputes to be resolved before the Dubai Courts. Copy of the LNTP Agreement appears not to have been executed as it has not been signed and therefore there cannot be reliance on it. Nonetheless, it is averred that terms of the LNTP Agreement was fully satisfied, paid and acknowledged. CESL further insists that the LNTP Agreement is the only binding construction agreement between Vetivert and CESL, implying that disagreement had nothing to do with the Consortium Agreement. It should be remembered that the award was granted on an alleged breach (which was confirmed) of the Agreement.

[10] CESL further states that the Agreement was merely an initial agreement for bidding purposes and did not include specific scope of works with associated cost and based on the parties undertaking to participate in the project with joint and several liability. CESL further complains that they were not given proper notice of the arbitration proceedings in

that the notice was served at a wrong address which consequently prevented them from appointing an arbitrator.

[11] CESL further avers that it would be against public policy to enforce the arbitral award of the DIAC in the following circumstances;

i. Vetivert employed means to have the matter that does not fall within the jurisdiction of the DIAC to be submitted to, and determined by the DIAC;

ii. Vetivert employed means to have the notice of arbitration served at a wrong address that is not in any way connected with to CESL so as to deny and prevent CESL from appointing an arbitrator.

[12] CESL further explains that it signed an agreement with PUC dated 01st August 2018 whereby it would design and construct a 5MW photovoltaic farm and that Vetivert had no contractual relation with PUC within the project contract. CESL and PUC agreed to add Vetivert as a subcontractor for the project and in turn entered into an agreement under the LNT which was fully paid to Vetivert. CESL has paid all substantial claims and executed works as per LNTP Agreement signed by the parties. However, Vetivert was mobilised as per contract to agree timelines and therefore Vetivert left the project on its own accord without suffering any loss of costs, profit or loss of revenue or executing any additional works other than what was on the LNTP Agreement.

[13] CESL claims that Vetivert is seeking to enforce an arbitral award in Seychelles Supreme Court which is out of jurisdiction of such arbitral award without following due process of such procedure. Additionally, Vetivert is seeking payment from PUC which is not a party of the dispute and again not following correct procedures in enforcing the claim where PUC was never mentioned in the arbitral award to process any payments. PUC is holding sums of money which is due to CESL.

[14] Therefore, CESL states that it rejects the Vetivert trials to reclaim the arbitral award from PUC since PUC is not a party to the dispute and any sum due to CESL from PUC is irrelevant to this arbitration case. CESL claims that Vetivert cannot seek to enforce the award in Seychelles. CESL further states that it rejects Vetivert's trials to involve PUC or

any other party in the Seychelles which or who is not connected to the arbitration action filed in the UAE as an attempt to unlawfully claim an award using Vetivert's presence in Seychelles while CESL is not so present and does not have any authority in the Republic of Seychelles.

[15] CESL prays for dismissal of the application as it does not have any presence nor registered as a company in Seychelles and that it may also have to face future risks of future trial and enforcement of the award in the UAE in addition to the present case.

[16] CESL further argues that several violations occurred in the arbitration process and lists what it considers these violations to be. In fact, in her submission, Counsel for CESL claims that Vetivert improperly instituted arbitral proceedings before the DIAC which assumed jurisdiction in the matter despite that the only agreed forum for dispute resolution under the LNTP Agreement is the UAE courts.

Background Facts

[17] It is common cause that Vetiver and CESL executed the Agreement on 25 July 2017 in view of submitting a joint-bid tender for the Seychelles 5MW PV Plant (the "Project") before the Abu Dhabi Future Energy Company PJSC and the Public Utilities Corporation of Seychelles (the "Client").

[18] The Parties then went on to execute the Limited Notice to proceed agreement on 30th August 2018 (which was to comply with a full notice to proceed agreement) for Vetiver to execute certain works valued at USD242, 706. The limited construction notice to proceed was subsequently amended on 20 December 2018 to add clearing, transportation, and storage of PV modules to Vetiver initial scope of work in the amount of USD51, 786 plus demurrage charges.

[19] The Agreement had a "Settlement of Dispute" clause, namely Clause 11, which is reproduced at paragraph 25 of the final arbitral award, in terms of which Vetivert and CESL agreed to refer disputes arising out of the Agreement to the DIAC under the DIAC Rules. The **Settlement of Dispute** clause states:

"11.1 The Parties shall seek to resolve in good faith any disputes or difference arising between them in respect of any matter connected with this Agreement. If the Parties cannot resolve such dispute or difference within 15 days of one party giving notice to the other, or such period as the Parties may subsequently agree, then the Parties may proceed in accordance with Sub-Clause 11.2.

11.2 Any dispute connected with the formation, performance, interpretation, nullification, termination or invalidation of this Agreement or arising from or related thereto in any manner whatsoever shall be referred to and settled by arbitration in accordance with the Arbitration Rules of DIAC (Dubai International Arbitration Centre) (the "Rules") by a tribunal of three members to be appointed in compliance with the Rules. The seat of the arbitration shall be Dubai and the arbitration proceedings shall be conducted in English. The decision of the arbitration shall be binding and final.

11.3 The Parties shall continue to fulfil their respective obligations under this Agreement and the Contract pending the resolution of any dispute pursuant to Articles 11.1 and 11.2." [Emphasis added]

[20] However, the Clause 8 of the LNTP Agreement provides that in the event of any disputes in connection with the LNTP Agreement, they shall be resolved in United Arab Emirates Courts. [underline mine]

[21] The parties bid was successful. However, at the Employer's request, CESL was asked to solely execute the EPC Contract of the Project ("EPC Contract"). Vetiver, aggrieved by these developments, alleged that CESL:

(i) Failed to settle invoices due to it under the Consortium Agreement;

(ii) Granted works that were to be exclusively carried out by it thereunder to another subcontractor; and,

(iii) Unlawfully terminated the Consortium Agreement, all of which prejudiced Vetiver and for which Vetiver sought to be indemnified.

[22] Being aggrieved by these alleged breaches, Vetiver commenced arbitration proceedings against CESL and made a Request for Arbitration with DIAC on 18 December 2019. The DIAC received the Request on 19 December 2019, and registered it under DIAC Case No. 189/2019. By letter dated 30 January 2020, DIAC highlighted CESL's failure to submit an answer within the prescribed period of 30 days and to nominate a co-arbitrator. DIAC further confirmed that CESL's failure would not prevent the arbitration proceedings from continuing in accordance with Article 5.6 of the Rules, and that the Executive Committee would appoint a co-arbitrator *in lieu* of the Respondent in furtherance to Article 9.4 of the Rules. The three-member arbitral panel comprised of Mr. Karim J. Nassif (presiding arbitrator), Mr. Pierre Mehawej, (Vetiver's nominated co-arbitrator) and Dr. Nabil Al Tawil (CESL's *in lieu* appointed co-arbitrator).

[23] On 03 February 2020 CESL responded to the Request, asserting that its Answer was filed within the deadline as it only the received the Request on 5 January 2020 and not 30 December 2019 contrary to pronouncement by DIAC. CESL argued that the address on which the Request was sent was not its official address as described in the Request. In addition, CESL contested the Tribunal's jurisdiction to look into the dispute and requested that the proceedings be put in abeyance considering that ongoing proceedings were engaged before the Dubai courts. CESL confirmed that it would not participate in the proceedings, whether by nominating a co-arbitrator or settling its share of the Advance on Costs. On 3 February 2020, DIAC confirmed receipt of the Answer but maintained that the Answer was filed outside the 29 January 2020 deadline. DIAC however noted that the Answer, together with the Jurisdictional Objections, would be referred to the Tribunal once constituted.

[24] On the 5th February 2020, Vetiver: (i) rejected CESL's Request for Abeyance; (ii) denied CESL's assertion that the Request was not duly notified to CESL by DIAC on 30 December 2019; and, (iii) insisted that CESL's refusal to participate in the proceedings was irrelevant to their progression. To that end, the DIAC ruled that since Vetiver rejected the Request for Abeyance, that the proceedings would not be suspended

[25] CESL insisted on its objections, to which Vetivert argued that such objections did not have basis or merits. Vetivert further maintained that proceedings instituted by CESL in a Dubai court had no bearing on the arbitration proceedings, and reserved its rights to be reimbursed for unnecessary costs incurred of CESL uncalled letters. In fact, this Court has been advised that such proceedings have been filed in the courts of Dubai. Such proceedings will indeed have no bearing on this Ruling. The DIAC held that; (1) the arbitration would not be put into abeyance considering Vetivert's objection of the same and (2) in reference to Article 8(2) of the Arbitration Law "*where an action before the court has been brought, the arbitration proceedings may nevertheless be commenced or continued, and an arbitral award may be made*"; that given the foregoing, CESL's refusal to participate in the proceedings would not hinder their continuation. Nonetheless CESL persisted in refusing to engage in the proceedings.

[26] CESL had objected to the DIAC's jurisdiction in hearing the matter. At a preliminary meeting the DIAC sought CESL to clarify its Jurisdictional Objections. CESL responded that the Arbitration Clause is non-existent because;

i. Of the invalidity of the Agreement which entails the invalidity of the arbitration agreement; or

ii. The signatory of the Agreement had no capacity or Authority to enter arbitration agreements on CESL's behalf.

[27] CESL requested the Tribunal to deal with the Jurisdictional Objections as a preliminary issue. Vetivert denied CESL's allegations and requested the Tribunal to deal with CESL's plea on jurisdiction in its Final Award. On 6 April 2020, the Tribunal issued Procedural Order No. 1 in which it directed the Parties "*...that the Claimant's Power of Attorney is valid and satisfactory for the purposes of the present arbitration proceedings*" and dismissed the "*Respondent's objections to it as the subsequent ratification of the act shall be considered as a prior mandate*" (Article 930). Further, that it "*accepts the Claimant's invitation to extend a new power of attorney ratifying all previous acts made in these proceedings...*"

[28] The DIAC made further statements and notes the following;

1. The Tribunal reminds the Parties that the IBA Rules were proposed to be used as guidelines in application of the UAE Arbitration Law and the DIAC rules, and a substitution as it seems to be the Respondent's understanding;

2. Article 23 of the UAE Arbitration Law permits to the Parties to agree on the rules in the present instance they agreed on the DIAC Rules.

3. Article 27.2 of the DIAC Rules provides that *"the Tribunal shall have the power to decide on the rules of evidence to be applied including the admissibility, relevant or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Tribunal."* The DIAC Rules grant the Tribunal the widest powers to decide on the rules of evidence; and

4. The Dubai Court of cassation as well, it has been decided *"that this exemption applies as well on the rules of evidence whether cited in the body of the Civil Procedure Code, the Civil Transactions Code or a separate Law."*

   In addition, a series of decisions of the Dubai Court of Cassation also confirmed the flexibility given to tribunals in selecting the applicable rules of evidence…

   Hence, the Tribunal is free to agree on any applicable rules of evidence for the conduct of the arbitration proceedings and reserves its rights to do so, when appropriate. However, that for the sake of good order, the Tribunal decided not to seek guidance from the IBA Rules.

   The Tribunal concluded that, after thorough deliberations and in accordance with Article 6.4 of the DIAC Rules, decided to rule on the plea concerning its jurisdiction as a preliminary question.

[29] On 10 May 2020, the Tribunal issued its Preliminary Award on Jurisdiction wherein it:

i. Rejected the CESL's jurisdictional pleas as regards the nullity of the Arbitration Clause;

ii. Rejected the CESL's plea that it was not bound by the Arbitration Clause in view of the incapacity of the signatory;

iii. Rejected the CESL's plea regarding the ill-formation of the Tribunal and the violation of its right to nominate a co-arbitrator; and,

iv. Declared that the Tribunal has jurisdiction to rule on the merits of the case.

[30] Thereafter, after pronouncing itself on the matters mentioned in paragraph 29 above, proceeded with the hearing and made a Final Arbitral Award ("the Final Award") dated 14th January 2021 in favour of Vetivert. That Final Award reads as follows;

"On Jurisdiction

497. The Tribunal refers to its Preliminary Award on Jurisdiction and reiterates that it has jurisdiction to settle the present dispute arising out of the Consortium Agreement.

"On the Merits

498. The Tribunal has considered when rendering this Award (i) all of the arguments raised by the parties from the beginning of these proceedings and to date, both in writing and/or orally at the Hearing; (ii) whether specifically referred to herein or not; and (iii) the filed evidence and prayers for relief.

499. For the reasons stated in this Final Award, the Tribunal:

1. *Declared that the Consortium Agreement is valid and binding;*

2. *Ordered the Respondent to pay the Claimant USD10, 000 against Civil drawings consultancy works costs;*

3. *Ordered the Respondent to pay the Claimant USD7, 776 for management costs;*

4. *Ordered the Respondent to pay the Claimant USD523 for water and electricity costs;*

5. *Ordered the Respondent to pay the Claimant USD120, 059 in compensation of the loss of profits due to the unlawful appointment of Farisko;*

6. *Denied the Claimant's claim for payment for the supply of SR Cement;*

7. *Denied the Claimant's claim for payment for insurance and general costs including transportation and logistics claim (i.e. domestic travel, international travel, local transportation) and legal support costs;*

8. *Denied the Claimant's claim for payment of further project management costs, supervision services, Augur test and other costs incurred.*

9. *Dismissed the Claimant's claim for interest on any amount deemed due;*

10. *Dismissed the Claimant's claim for additional compensation; and,*

11. *Dismissed any other claims not awarded.*"

[31] The Final Award issued by the DIAC orders CESL to pay the Vetivert US$286,970.49. In receipt of the Final Award, Vetiver approached this Court for an order of recognition and enforcement of the DIAC Final Award under section 227 of the Seychelles Code of Civil Procedure, Articles 146 and 148 of the Commercial Code and Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereafter, "the Convention").

[32] On the 14th October 2021 this Court issued an order stating that in the application a wrong procedure was adopted, that the Registrar of Supreme Court erroneously referred the matter to the trial Judge without first dealing with attachment of funds which is the

subject of the arbitral award, which would have been the correct procedure. Subsequent to this, the Judge will validate the attachment. Only once that is done, the Respondent/Award Debtor may object to enforcement. That lapse was subsequently cured by the Registrar.

Enforcement of the Arbitral Award and Invoking Application of the New York Convention.

[33] It is the contention of CESL that the Convention has not applicability to the present case. They argue that the Convention only been acceded to by the Seychelles in February 2020. Vetivert argues that the Convention was not ratified by Seychelles because it was already inforce at the time Seychelles agreed to be bound by it, the National Assembly having resolved to accede to it.

[34] In fact CESL resisted Vetivert's application on the basis that the Convention, arguing that application is made under Article 148 of the Commercial Code which has been brought into force following the ratification of the Convention in 2020. CESL further contends that the dualism of Seychelles in matter addressing international instrument ratified or acceded to must be domesticated by further process of legislation for the provisions of the instrument. Counsel for CESL further in maintaining its objection, on the use of Article 148 of the CC to justify the enforcement of the award citing **Vijay Construction (Pty) Limited v Eastern European Engineering Limited SCA 15 and 17/2017 delivered on 13 December 2017) ("Vijay 2017")** where the Court of Appeal held that the NY Convention was not applicable in the Seychelles, and that, accordingly, Articles 146 to 150 of the CC have no legal effect. On page 6, paragraphs 14 and 15 of CESL's objections, their attorney states as follows;

"*14. However, based on the reasoning of the Seychelles Court of Appeal in [the Vijay case] (supra), the accession and entry into force of the [NY] Convention for Seychelles in 2020 could not have automatically given effect to articles 146 to 150 of the CC. Since 'Article 64 of the Constitution specifically grants the President, as Head of State, the power to decide on whether to sign, ratify, accede to any international treaties and the Legislature to pass the necessary laws once ratified and acceded to as part of the dualist system reflected within the said [Article.], a further legislative step had to be fulfilled to bring articles 146 to 150 of the CC in force and render it binding in Seychelles.*

15. It is submitted that the Seychelles' accession to the [NY] Convention in 2020 did no more than to highlight the legislative intent (translated in articles 146 – 150 of CC) to enable the enforcement of foreign arbitral awards in Seychelles. To date, the legislator has not completed the legislative process in consequence of which arbitral awards referred to under article 146 of the CC and the [NY] Convention are still not enforceable in Seychelles" [underline mine]

[35] To put it succinctly, Vetivert in praying for the Court's intervention for the enforcement of the DIAC award, submits that the Convention has been acceded to by Seychelles in February 2020. They agree that the Convention was not ratified by Seychelles, but state that is because it was already inforce by the time Seychelles agreed to be bound by it, the National Assembly having resolved to accede to it. I support this argument.

[36] Nonetheless, strictly speaking ratification is the second part of a two-part process which begins with an international instrument being signed by or on behalf of the Executive and then ratified by the National Assembly in terms of Article 64 of the Constitution. Vetivert avers that when an instrument has already come into force, a state party wishing to be bound by it cannot sign and ratify it, but it has to accede to it and that this was done. In fact Article 64 (3) of the Constitution provides that; *"[T]he president may execute or caused to be executed treaties, agreements or conventions in the name of the Republic."* Article 64(4) reads thus;

"A treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by –

(a) an Act;

(b) a resolution passed by the votes of the majority of members of the National Assembly.

Article 64(5) states –

"Clause (4) shall not apply where a written law confers upon the President the authority to execute or authorise the execution of any treaty, agreement or convention."

[35] Vetivert disagrees with the position adopted by CESL. In answer, they argue that the rule is not universal for the simple reason that some international instrument are self-executing and does not require domestic legislation as further steps to make it binding domestically. Vertivert dismisses the issue as being irrelevant to the case. I tend to believe that the matter has some relevancy since they are invoking the Convention and article 146 and 150 of the Commercial Code in making the application for validation of the attachment. Nonetheless. Vetivert avers that this is not a case where the state has not yet legislated to bring the Convention into force. They argue that the Republic had already done so in the form of Articles 146 and 150 of the Commercial Code.

[36] The defining issue here is whether these articles constitute domestic legislation giving life to the Convention. In **Vijay Construction (Pty) Limited V Eastern European Engineering SCA 15 and 17/2017 (delivered on 13th December 2017)** the Court held that *".....the text of Article 146 and others remained part of our domestic law. This article needs to have life breathed in into in order to waken it from its slumber."* At the time of promulgation of the Commercial Code on 01st January 1977, Article 146 was already fully operational. It worked provided that other transacting state was a member of the convention. It is argued that the Convention ceased to have domestic application after the renunciation in 1979. However, it should be emphasized that this was a repudiation of the Convention, not Article 146 and 150 of the Commercial Code. That suggests, in order to *"waken it from its slumber"* required the Convention to have applicability within the jurisdiction. The question is whether this required ratification as provided for under Article 64(4) of the Constitution? I interpret *"to be awaken from its slumber"* not to mean that it was put to sleep nor repealed.

[37] This Court hold the opinion that there is nothing inappropriate and illegal with domestication (through legislation) preceding signature or accession. In **BCB Holdings & Anor v The Attorney General of Belize [2013] CCJ5 (AJ),** a case also quoted by

Counsel for Vetivert, the Court held that there are many occasions where legislative incorporation of a treaty has preceded executive acceptance of that treaty. Citing various examples, the Court held that not only is pre-acceptance enactment not illegal, but it has been recommended by colonial legal systems and academic writers.

[38] In fact Vetivert submitted that Articles 146 to 150 of the Commercial Code are very much in force. If they were slumbering from 1977 (or 1985 when Seychelles repudiated the Treaty Succession Agreement, and thereby the Convention which had been extended to Seychelles by virtue of that Agreement) to 2020, they were woken by the accession of Seychelles to the New York Convention in early 2020. It is my view that these articles did not, as submitted by the Counsel for CESL, need to be given a commencement notice as they were in force (but inapplicable because the Convention underpinning them was not available) since 1977. This is a position which finds favour with the Court.

[39] Vetivert further correctly posited that the Commercial Code deals with arbitrations in Articles 110 to 150. That articles 110 to 145 deal with domestic arbitrations. Article 146 to 150 deal with New York Convention awards. That this is clear from a reading of the opening words of Article 146 and from the fact that Article 146 to 150 are faithful reproductions of Articles I to VI of the Convention. The process of enforcement of domestic awards is to be found in Article 131 and 138(2). Therefore, the the procedure is that the arbitrator deposits the award with the Registrar of the Court and then the award creditor applies for registration and enforcement.

[40] This Court holds that the Convention has applicability in this case for reasons articulated above and below under the heading *'Final Discussions'*. After all, there is a difference between repudiation and repeal of legislation. We are concerned with a repudiation of a piece of legislation.

Difference Between Repeal and Repudiation of Legislation

[41] The provisions of Articles 146-150 of the Commercial Code have all along existed; they were in a slumber. CESL's assertion that there still is required that there be legislation domesticating the provisions of the Convention. CESL'S argument is devoid of merit as

has been argued above. It will further be shown below that the argument is not maintable. Further evidence is derived once again from the same **Vijay** judgment where in paragraph 100 and 101 the court stated thus:

> "*At the time of the promulgation of the Commercial Code on the 1st of January 1977, Article 146 was therefore fully operational, it was working, provided that the other transacting State was a member of the NY Convention. As we have seen, this was so by virtue of the British ratification of the NY Convention and the subsequent Seychelles Independence Order.*
>
> *However, it was short lived. Through the conscious and deliberate act of repudiation and renunciation in 1979, the NY Convention ceased to have its domestic application, though the text of the Article 146 and others remained part of our domestic law. This article needs to have life breathed in into in order to waken it from its slumber. The only way is to follow the dictate of our supreme law.*"

[42] The Court of Appeal in the above quote posits the status of these provisions succinctly: they were "*fully operational*", and "*working*" that notwithstanding their repudiation, they "*remained part of our domestic law.*" The effect of such repudiation was that they went to "*sleep*" or were ineffective or lying dormant (though having all the qualities of fully-fledged legal provisions). This explains the court's analogy of these provisions being brought to life or awoken from "*slumber.*"

[43] The Court of Appeal then specifically stated what needs to be done to breathe life into these provisions that were already in place as follows per paragraph 102:

> "*In order to give life to the NY Convention in our domestic law, the President would have to execute it and the National Assembly would have to ratify it. Ratification may properly be done in this case by way of a resolution of the National Assembly, given the existing provisions of Article 146 of the Commercial Code.*"

[44] Nowhere does the Appeal Court makes mention of there being a need for the provisions to be "repealed" or to "enact" a new domestic law as this already exists. As per Halsbury's Laws of England, the term "repeal" stands for revoking and abolishing an Act and all its effects which cause it to cease to be a part of statutes of books or body of law. According to the Black's law dictionary, the term repeal means a legislative act which abrogates or obliterates an existing statute. Undeniably, Articles 146-150 were never repealed. As the Appeal Court in the aforementioned **Vijay** case stated, that the provisions of Articles 146-150 had been put to slumber. With the NY Convention now in force, the Articles of the Commercial Code in question have now awakened from their slumber.

[45] First, the case in ***Vijay*** establishes that while Articles 146-150 "*have been enacted as part of the Commercial Code*" of Seychelles, the articles have no legal effect because Seychelles is not a party to the Convention and there is no reciprocity – in terms of the Convention – between Seychelles and member States to the Convention. In stating the above, there was always a recognition that these provisions were still well in existence, but only of no legal effect.

Jurisdiction of the DIAC

[46] CESL challenged the arbitral award arguing that it should be set aside as the matter did not fall within the jurisdiction of the DIAC. I believe that such argument is untenable. Support from this position can be garnered from a New Zealand case of **teleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd [2011] NSWSC 1365 (11 November 2011),** where the plaintiff, teleMates (an Australian telecommunications company), entered an agreement with the defendant, SoftTel (an Indian marketing and support services company), in terms of which the defendant was to market, promote and solicit applications for the plaintiff's services. The agreement was for an initial term of 12 months with further automatic yearly renewals unless appropriate notice was given. A dispute arose as to whether the agreement had been validly terminated.

[47] The agreement contained a dispute resolution clause under which the parties agreed to refer any dispute arising under the agreement to arbitration:

> *"If any dispute, difference or claim arises between the parties in connection with this agreement or the validity, interpretation or alleged breach of this agreement or anything done or committed [sic] to be done pursuant to this agreement, the parties shall refer the dispute, difference or claim for resolution for Arbitration. Both parties shall agree to appoint an Arbitrator. The Arbitral Proceedings shall be in accordance with the provisions of "The Institute of Arbitrators & Mediators Australia (IAMA)" and the laws of the state of New South Wales, Australia, shall be applicable. All proceedings in such arbitration shall be conducted in English. The venue of arbitrators shall be mutually decided within New South Wales Australia."* [Emphasis mine]

[48] The defendant referred the dispute to IAMA, who appointed an arbitrator. The plaintiff contended that, under the dispute resolution clause, an arbitration could only commence by agreement and that at no time had the plaintiff consented to either the referral or the appointment of an arbitrator. The arbitrator heard the plaintiff's arguments at a preliminary conference before ruling provisionally that the arbitration should proceed. The arbitrator noted that some of the plaintiff's assertions as to jurisdictional matters could only be tested by the submission of evidence, counter-submission, and him ruling on such evidence.

[49] After lengthy submissions from both parties, the arbitrator published an interim award on jurisdiction. The arbitrator disagreed with the plaintiff's submission that the dispute resolution clause incorporated the IAMA Rules only so far as they applied to procedures for the arbitration once the arbitral tribunal had been constituted. He agreed with the defendant's submissions that the dispute resolution clause had the effect of incorporating all of the IAMA Rules, including those which made provision for the appointment of an arbitrator in the absence of agreement between the parties. Ultimately, he determined that he had been properly appointed and that he had jurisdiction to determine the dispute.

[50] The plaintiff took the issue to the New South Wales Supreme Court, seeking, amongst other things:

- A declaration that the arbitrator had not been appointed as the arbitral tribunal for the purposes of determining the dispute.

- An interim order, pending final determination of the proceedings, restraining the defendant from proceeding with a purported arbitration before the arbitrator.

[51] The defendant did not appear. In his judgment, Hammerschlag, J held that it was not necessary to determine whether the IAMA rules applied under the dispute resolution clause. He noted that Articles 5 and 16 of the UNCITRAL Model Law (as incorporated into the International Arbitration Act 1974) make it clear that no court may intervene to determine the matter of an arbitral tribunal's jurisdiction where the tribunal has itself determined the matter in favour of jurisdiction as a preliminary question, unless such a request is made in the time specified. He found that the plaintiff had failed to make such a request within 30 days of receiving notice of the ruling and held that the court could therefore not intervene and the arbitrator's award must stand. Citing the doctrine of "separability", which he said allows a tribunal to assume its own jurisdiction before it decides its own jurisdiction, Hammerschlag, J rejected the argument that Article 16 did not apply because the arbitrator was not validly appointed.

[52] I believe that the above New Zealand case's facts and judgment is of persuasive value in the present case. The arbitration proceedings at the DIAC were initiated in 2019. The rules applicable then were the **2007 DIAC Rules**. Article 37.1 of the DIAC Rules of 2007 provided as follows:

> "*The Award*
>
> *37.1 The Tribunal may make preliminary, interim, interlocutory, partial or final awards.*
>
> *37.2 All awards shall be made in writing and shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to*

carry out any award immediately and without any delay; and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made."

[53] The above provision in the rules, together with Article 11.2 in the Agreement signed by the Parties which provides that "*The decision of the tribunal shall be binding and final*" reinforces the fact that the parties at contracting meant for arbitration to deal with any disputes arising from the Agreement, and thereafter to ensure compliance with the decision of the Tribunal. Furthermore, CESL on its own volition decided not to nominate a co-arbitrator. Nonetheless the Respondent was still bound by the Rules and the proceedings would continue unabated.

[54] Pertinent to the present query, Article 6.2 of the DIAC Rules conferred the Tribunal with power to rule on its own jurisdiction, including on the existence, validity, scope, applicability or interpretation of the arbitration agreement.

[55] The DIAC dealt with the issue of jurisdiction raised by the Respondent as a preliminary matter, heard Respondent's representations, and thereafter made an interim ruling dismissing the Respondent's opposition to the DIAC exercising jurisdiction, and reiterated the same position at the time it issued its Final Award.

[56] Therefore, argument that the DIAC did not have jurisdiction to adjudicate over the matter does not hold water and I hold that the DIAC had full power to deal with the claim and CESL cannot but blame themselves for failing to appoint an co-arbitrator and in any case I do not believe that it was their intention to submit to the jurisdiction of the DIAC on this matter.

Notice of arbitration proceedings, appointment of co-arbitrator and participation at the DIAC

[57] In the present case, CESL was given the opportunity by the DIAC to nominate a co-arbitrator but failed and / or refused. CESL also refused to participate in the proceedings. They were further given a chance to make presentations on its objections which they did

not. Lastly, it requested the DIAC to rule in the preliminary issues prior to proceeding on the merits and the hearing. Despite CESL's opposition thereto, the DIAC made a preliminary ruling on those issues raised as prayed for by CESL. All the concerns raise were adequately addressed by the DIAC in terms of the DIAC and arbitration rules. In short, CESL was given notice of the proceedings, given equal opportunity to present its case, and to nominate a co-arbitrator, which rights they chose not to exercise. I believe that CESL's argument on this point is also not valid.

Failure to Attach Authenticate Final Award.

[58] Section 149 of the CC makes it a requirement that a party seeking to enforce an arbitral award provides with the application (a) an original or a duly certified copy of the award and (b) the original or a certified copy of the arbitration agreement. In fact the section reads as follows;

"The party seeking to enforce an arbitral award under the Convention must provide:

(a) the duly authenticated original award or a duly certified copy thereof; and

(b) the original arbitration agreement or a duly certified copy thereof; and

Where the award is an agreement in a foreign language, a translation thereof carried out by an official or by a sworn translator by a diplomatic consular agent."

[59] CESL had argued that the application should be dismissed since Vetivert only produced copies of the Final Award and the Consortium Agreement without the original and that such copies were not authenticated.

[60] The copy of the Agreement produced was certified by Mr. Bernard Georges, Counsel for Vetivert. This is a practice that should be discouraged as Mr. Georges is Counsel on record for this case. Preferable it should have been certified by a different notary. The copy of Final Award has been stamped as a "certified copy" and it also bears the supposed signature of Dr. Firas Adi and a stamp of "International Law Firm Bonnard Son". Counsel for CESL questioned the capacity of Dr. Adi to certify the Final Award. She note that it is not stated whether Dr. Adi is a Notary or an attorney within the said

law firm. She concludes that in the absence of the above, the certification of such document is dubious. As for the Consortium Agreement, it is merely a copy of the agreement that was produced.

[61] Counsel for CESL casts doubts as to signature on, and that the genuineness of the Final Award could have been resolved had the seal of the DIAC been affixed on it. Furthermore, had Dubai been a party to the Hague Convention, the Final Award could have been certified be a true copy by a notary or an attorney-at-law then apostilled and admitted as properly authenticated and certified as required under Article 149 of the CC. Counsel also referred to Van Den berg in the New York Arbitration Convention 1958:

"For the authentication of the original award it is generally sufficient to have this formality accomplished by a diplomatic or consular agent of the country in which the enforcement is sought, located in the country where the award was made. For example a Swiss Court that Article IV(1)(a) was complied with where the original award, made in Rotterdam was authenticated by the Swiss Counsel in Rotterdam. This normally corresponds with the application of the law of the country in which the enforcement of the award is sought. As explained above, the application of the law of the country in which the award was made can also be deemed a possibility of Article IV. The latter is usually envisages the authentication by the competent authority of the country in which the award was made. That authority may be a judicial officer, a notary etc., in that country, or a diplomatic or consular agent of that country in which the enforcement of the award is sought."

[62] In **Viral Dhanjee v James Alix Michel SCCC CP03/2014** the Court of Appeal that *"applicants might be hurt when petitions or application are dismissed due to legal technicality. But in the long run, rule of law may be hurt, if we allow some procedural irregularities to continue....."* In **Ratnam Cumarasamy [1964] 3 ALL ER** 933 it was held that *"rules of court must prima facie, be obeyed, and in order to justify a court extending the time which some step in procedure is required to be taken, there must be some material on which the court can exercise its discretion."*

[63] I am one who believes that rules of procedure and the law must be adhered to. Section 149 of CC requires that an authenticated original or a duly certified copy of the original of the Final Award and the arbitration agreement be produced. Vetivert failed to produce such. It is important that authentic documents are produced to Court as evidence, as there is always the possibilities of forgeries being certified as original, which would not render them apparently authentic; see **Zalazina v Zoobert Ltd [2013] SLR 187**. In **Financial Intelligence Unit v Sentry Global Securities Ltd [2011] SLR 129** the Court held that where documents from foreign Courts are relied upon, the documents must be certified by a competent authority to give efficacy in Seychelles.

[64] However, in **Tornado Trading & Enterprise EST v PUC and Procurement Review Panel** (delivered on 24 November 2020) reversing the Ruling of this Court, the Court of Appeal departed from the position adopted in the **Viral Dhanjee** case and went on to allow the production of uncertified copies of documents to be exhibited.

[65] Article IV of the NY Convention Guide states that the Convention imposes significantly fewer requirements compared to the 1927 Geneva Convention. In this way, the Convention eliminates unnecessary formalities and ensures that foreign arbitral awards are recognized and enforced as early as possible. It should be noted that article 35 (2) of the UNCITRAL Model Law on International Commercial Arbitration, which mirrors article IV of the NY Convention, was amended in 2006 to liberalize formal requirements: to duly authenticate or certify copies of the award as a requirement and presentation of a copy of the arbitration agreement is also no longer required, (see the New York Convention Guide).

[66] I find that in this case the Vetivert has failed the standard required under section 149 of CC. However, despite CESL questioning the genuineness of the Final Award and the arbitration agreement, I do find any evidence to believe that they are not true copies and considering the position adopted by the Court of Appeal in the **Tornado Trading** case, though with a bit of reluctance I depart from a strict interpretation Article 149 of CC and admit the Arbitral Award and the Consortium Agreement as exhibits in this case.

Application Commenced by the Wrong Procedure and or/has not been made in accordance with Rules of Procedure for the Enforcement of Foreign Arbitral Awards.

[67] CESL challenges the form of Vetivert's application.

[68] Counsel for CESL noted that Vetivert seeks the attachment of the award sum by way of an application made under section 227 of the SCCP and Article 146 and 148 of the CC. She goes on to add that section 227 of the SCCP provides that arbitral awards under the Convention as provided under Articles 146 and 148 of the CC shall be enforceable in accordance with the provisions of Book 1, Title X of the said Code

[69] It is abundantly clear from a reading of the opening words of Article 146 and from the fact that Article 146 to 150 are faithful reproductions of Articles I to VI of the Convention. It is Vetivert's contention that the process of enforcement of domestic awards is to be found in Article 131 and 138(2). Vetivert argues that the procedure is that the arbitrator deposits the award with the Registrar of the Court and then the award creditor applies for registration and enforcement.

[70] Vertivert nonetheless argues that the process of enforcement of arbitral awards is less clear. Counsel refers to section 227 of the SCCP which provides;

"Arbitral awards under the New York Convention, as provided under articles 146 and 148 of the Commercial Code of Seychelles, shall be enforceable in accordance in accordance with the provision of Book 1, Title IX of the said Code."

However, in making the application, Counsel for Vetivert omitted to identify the provisions of the law under which the application was being made, certainly no reference was made section 227 of the SCCP. However, in his submissions Counsel for Vetivert refers section 227.

[71] That Title IX of the Commercial Code contains Articles 110 to 150. That Article 146 and 148 of the Commercial Code, in relevant parts provide:

> "146. *On the basis of reciprocity, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and the arbitral*

award within the meaning of the said Convention shall be binding." [Underline mine]

"148. *Arbitral awards under the said Convention shall be recognized as binding and shall be enforced in accordance with the rules of procedure in force in Seychelles.*" [Underline mine]

[72] That in some countries, such as the United Kingdom, there is specific legislation setting out the procedure to be followed. Thus for instance, section 101 of the UK Arbitration Act 1996 provides:

"***101 Recognition and enforcement of awards***

(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect."

[73] In the United Kingdom, the position is that although recognised as binding, a Convention award can be enforced with leave of the court. Such provisions do not exists in Article 146 to 150 of the CC. Instead the same provision for leave is to be found in Article 138.2 of the CC. That if the same procedure was intended to apply to Convention awards, then Article 148 would specifically say so.

[74] I further rule that Article 148 of the CC makes it clear that the recognition and enforcement of the Convention award are to be made in accordance with the rules of procedure inforce in Seychelles. The form of the request for recognition and enforcement of a convention award is to be determined by the national law. She further adds that that in that respect, Article 138.2 of CC provides that *"[A]n award under an arbitration agreement may be registered by leave of the Supreme Court or a Judge thereof, an*

enforced in the same manner as a judgment or order to the same effect and where leave is so given, judgment may be entered in terms of the award."

[75] This Court agrees with Counsel for Vetivert who on the other hand argues that the question that should be asked is; can the words "*enforceable in accordance with the provisions of Book 1, Title IX of the said Code*" in section 227 of the Seychelles Code of Civil Procedure make the procedure for the recognition and enforcement of domestic awards also applicable to Convention awards? It is the position of Vetivert that the answer to this question will depend on whether Articles 110 to 145 of the CC apply to non-domestic awards. Counsel for Vetivert submits that this matter has been determined by the Court in **Eastern European Engineering Limited v Vijay Construction [2017] SCSC 375** where Robinson J, (as she then was), categorically stated in paragraph 208 (b) of the judgment that "*from a reading of Articles 110 to 145 of the Commercial Code, the provisions apply solely to local arbitral awards.*" That in fact this Court dismissed an application by Vijay to set aside an award under Article 134 of the Code because the award was not a domestic award and Article 134 only applied to domestic awards. Vetivert argued that the words set out at the start of this paragraph must be read as being limited to Articles 146 to 150 of the Code, being the part of the Code as deals with Convention awards. The Convention award therefore requires no intermediate step to render it enforceable in Seychelles.

[76] The words *"shall be recognised as binding"* in Article 148 is particularly important. That is because the Convention award is already recognised by reason of it being a Convention award. No further process of recognition is necessary. The award can be subject to Article 149 being enforced by simply following the rules of procedure. There is no requirement to deposit the award with the Registry or to seek to have it registered. That in fact, all that is required is set out in Article 149. This article says that the award creditor "*must provide*" (as opposed to seek leave) a certified or authenticated copy of the award and a copy of the arbitration agreement. This is in line with the tenor of the Convention, which is to provide a swift method of enforcing foreign arbitral awards made in terms of the Convention. Unlike in a case of domestic awards where Article 138(2) provides that domestic awards will be enforced in the same manner as judgment, there are no rules of

procedure in force in Seychelles for enforcement of Convention awards. In this case, I find that the best procedure to be followed closely as possible those in sections 239 and 240 of the SCCP.

Application Unsupported by Affidavit

[77] Vetivert commenced the present proceedings by way of an application. This application is captioned as *"Application for Validation of Attachment"*. That was filed on 08th November 2021. There is no affidavit attached therewith. Before that, on 21 September 2021, they had filed an Application for Provisional Attachment Under Section 280 of the Seychelles Code of Civil Procedure. An affidavit sworn by Mr. Radley Webber is attached therewith. On 31st March 2021 in court case MC31 of 2021, Vetivert had filed an application captioned *"An Application for Attachment of Sums Due Under Arbitral Award Under Section 227 of the Seychelles Code Civil Procedure, Articles 146 & 148 of The Commercial Code and Article IV of The New York Convention"*.

[78] CESL submits that having commenced the present action by way of an application, the burden of submitting a prima facie case needed to be discharged by way of an affidavit. They further argue that the Court cannot rely on Counsel's production of documents to find that a prima facie case has been made. Counsel referred to **Abyasov v Outen and Ors. (SCA 56/11 & 08/2013) [2015]** where the Court of Appeal held;

"From the moment the respondents choose to initiate their action, it followed that the hearing would be, by and large, by affidavit evidence and not by oral testimony. It is a case ill-suited for viva voce testimony considering the nature of the action, the remedy prayed for, the practice of the courts, the type of the party involved and the related matters of proceedings and pleadings. He who pays the piper calls the tune. He who initiates action has carriage of proceedings."

[79] In answer to that objection Counsel for Vetivert argues that there is no requirement for leave to be sought to enforce a Convention Award, and section 239 of SCCP does not require any affidavit to support an application for execution. Section 239 provides;

239. *"Every application for execution shall be in writing and signed by the judgment creditor or by his attorney, if any, and shall contain the following particulars:*

(a) the title and number of the suit;

(b) the date of the judgment order;

(c) whether any appeal has been entered;

(d) the amount for which the judgment has been given and of the costs;

(e) the sum if any has been paid in satisfaction or the judgment or order;

(f) the name of the party against the enforcement of the judgment is asked for;

(g) the nature of the execution asked for.

The taxed bill of shall be attached to the application.

The Registrar shall note on the application the date and time when the application is received.

[80] When the matter was placed before the Registrar for attachment, I do not believe that the necessary particulars as per section 239 were complied with. There was then no affidavit attached to the application. There was neither any affidavit attached to the application for validation. However, I consider the word application in this section to have a more universal meaning rather than legal meaning. Under Schedule C of the SCCP, there is no specimen example or format as to how such application should take. There is no specific form that such application should comply with. I do not believe that there is an absolute necessity for there to be an affidavit attached to the application in this case. Therefore, I

find the application cannot be denied due to the absence of such affidavit. Vetivert has produced copies the Agreement and the Final Award, that should suffice.

Enforcement of Debt Against PUC

[81] CESL argues that the Vetivert cannot seek to enforce the DIAC award against funds held with PUC because there was no mention of PUC in the DIAC award, and that it would be unlawful for the Vetivert to proceed against its funds held with PUC. While there is no specific provision in Seychelles for a judgment creditor to proceed against assets of a judgment debtor in a foreign arbitral award, benefit may be received from the practice in England and Wales. In that jurisdiction, where a party has obtained a favourable arbitration award in a jurisdiction other than England and Wales, and the respondent to those arbitration proceedings has assets within England and Wales, the successful party may wish to enforce the arbitration award in the England and Wales. Justification for this position is that the aim of the NY Convention being to provide a common framework which all signatory countries must adopt when deciding whether to enforce a foreign arbitral award. Consequently, the NY Convention allows foreign arbitral awards to be enforced with some amount of ease in the court of another signatory state, (see Lewis Silkin, Enforcing arbitral awards in England and Wales, October 2021)

[82] In the present case, the CESL has funds held by PUC, which Vetivert, as Judgment Creditor, should be able to obtain attachment thereof and access to in the event that its application is successful against the CESL, as Judgment Debtor. This may validly be done in the Seychelles in accordance with prevailing enforcement laws,

Setting Aside and/or interference of Arbitral Awards

[83] Many have commented that the courts have an important role to play through their intervention at various stages of the arbitral process. In the absence of such intervention the fair resolution of disputes before an impartial tribunal, without unnecessary delay or expense, may not be achieved. Whether court intervention is viewed as supporting or

interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such intervention. Much will also depend upon the relative importance of the competing concepts of party autonomy and due process. Consequently the question of whether intervention supports or interferes with the arbitral process is often hotly debated.

There is a view, particularly amongst those involved with international arbitration, that the involvement of courts in the arbitral process generally constitutes unwanted interference. But the reality is that arbitration would not survive without the courts. Indeed, it is only a court with coercive powers that could rescue an arbitration which is in danger of floundering."

[84] The development of international arbitration and arbitration generally requires "*minimum court intervention, maximum court support.*" To that end, Article 34.2(a)(i) of the UNCITRAL Model Law on International Commercial Arbitration 1985, (United Commission on International Trade Law, Model Law on International Commercial Arbitration 1985) establishes that an arbitration award may be set aside if the party making the application furnishes proof that (i) he or she was under some incapacity, or (ii) the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the seat of the arbitration. CESL failed to adduce evidence of these two conditions prevailing in the present circumstances.

[85] CESL argues that in fact the Vetivert was supposed to have signed a LNTP agreement which would have required that disputes emanating thereto be brought before Dubai courts, which LNTP agreement the Vetivert failed to sign. Unfortunately the same LNTP Construction Agreement was not signed. What the DIAC had before it though was a signed Consortium Agreement, and, as the trier of the facts before it, found that there was a violation of the Consortium Agreement and adjudicated in Vetivert's favour.

[86] I opine that the ***teleMates*** case is important as it provides this Court with a yardstick, against which it can determine whether or not to intervene/interfere in the arbitral process, given the provisions of the UNTRAL Model Law, the DIAC rules and Agreement signed between the Parties. Similarly, in other jurisdictions such as in

Canada, so far as enforcement of foreign arbitral awards is concerned, the courts give deference to the arbitration tribunal and will enforce the award, subject to limited grounds to refuse recognition and enforcement. In all cases, the enforcing court has no power to deal with the merits of the underlying arbitration.

Final Discussions

[87] The Seychelles becomes the 162nd State party to the New York Convention on 03rd February 2022. The Convention came into force for the Seychelles on the 3rd May 2020. The Cabinet and the National Assembly had approved the accession on 28 November 2019 and on 10 December 2019, respectively. On 23 January 2020, the International Affairs Committee of the National Assembly of Seychelles had resolved to seek the President's authority to present the accession instruments to the United Nations. Seychelles made two reservations regarding the application of the Convention These have been highlighted above.

[88] The question these developments have introduced relates to whether such accession by the Seychelles to the NY Convention had the effect of making it possible now for parties to a foreign arbitral award to seek enforcement of same in Seychelles. In other words, would the accession to the NY Convention have the effect laid down in the ***Vijay*** case, and in what way?

[89] Article 227(2) of the SCCP states that:

> *"Arbitral awards under the New York Convention, as provided under articles 146 and 148 of the Commercial Code of Seychelles, shall be enforceable_in accordance with the provisions of Book 1, Title X of the said Code."*

[90] Article 146 of the CC states:

> *"On the basis of reciprocity, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and the arbitral award within the meaning of the said Convention shall be binding. Such Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a*

State other than Seychelles and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in Seychelles."

[91] The UAE adopted the NY Convention by Federal Decree No. 43 of 2006, the principle of reciprocity required by Article 146 is satisfied. Article 148 of the Commercial Code on the other hand provides as follows:

> "*Arbitral awards under the said Convention shall be recognised as binding and shall be enforced in accordance with the rules of procedure in force in Seychelles. The conditions or fees or charges on the recognition or enforcement of arbitral awards to which the said Convention applies shall not be more onerous than those required for the recognition or enforcement of domestic arbitral awards.*"

[92] Article 148 raises the question as to whether the Final Award issued by the DIAC qualifies as an "*arbitral award under the said Convention*" per article 148, and therefore recognised as binding and enforceable in Seychelles. Both parties to these proceedings, in support of their application and defence, invoked, among others, the case of **Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd CC33/2015 [2017] SCSC 375.** In this case, Eastern European Engineering Ltd (hereafter "EEEL"), which had obtained an arbitral award at the International Chamber of Commerce (the "ICC") in Paris against **Vijay Construction (Proprietary) Ltd** (hereafter "Vijay"), approached the Supreme Court seeking the Court's recognition of and declaration of the final arbitral award executory and enforceable in the Seychelles. The Court entered judgment for EEEL against Vijay recognising and declaring the Final Arbitral Award executory and enforceable in Seychelles (per paragraph 307).

[93] In an appeal by Vijay filed on 21 June 2017 against EEEL in the case of **Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd SCA 15 & 18/2017**, the court, in its judgment dated 17 December 2017, discussed the legislative history of Articles 146-150 of the CC. The Appellant had argued that Articles 146-150 of the CC were legislated with a view of subsequently ratifying the NY Convention. In coincidence, the Court proceeded to consider the history prior to the coming into force of

the Commercial Code, which came into effect on the 7th June 1959. The United Kingdom (UK) acceded to the NY Convention by instrument dated 24 September 1975. That at the time the UK acceded to the NY Convention, Seychelles was a colony of Britain. When Seychelles gained independence in 1976, all obligations and responsibilities of the government of the UK and Northern Ireland which arose from any valid international instruments from 29 June 1976, were to be assumed by the Government of Seychelles insofar as such instruments may have been held to have had application to Seychelles. Therefore, at the time the CC came into existence in 13 January 1977, Seychelles by this instrument had from the 29th June 1976 succeeded to obligations and responsibilities arising from any valid instrument, including the Convention, as the UK had acceded to it on the 24th September 1975.

[94] However, pursuant to Article 8.1 of the Vienna Convention on the Succession of States in Respect of Treaties ("VCSSRT"), the Ministry of Foreign Affairs by Note No. 37/79, notified the British Government that it did not consider itself bound by treaties which came within the ambit of the Treaty Succession Agreement. On the 12th July 1985 Seychelles communicated that, save in respect of treaties acceded to by Seychelles, that it did not regard any of the relevant treaties as continuing in force in Seychelles. The Court of Appeal in **Vijay** concluded that the consequence of such repudiation of the Treaty Succession Agreement, all obligations and responsibilities of the Government of the UK and Northern Ireland arising from any valid international instrument, (including the NY Convention) ceased to have effect. Further, that the repudiation resulted in the non-applicability of Articles 146 -150 of the Commercial Code. And relevant for those proceedings before the Appeals Court, there was no evidence that Seychelles acceded to the said NY Convention thereafter.

[95] The Court of Appeal further enquired into the Constitutionality of the Treaty-Making Process Applicable in the Case. The Court cited Article 64(4) of the Constitution which states:

"A treaty, agreement or convention of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by:

(a) An Act; or

(b) *A resolution passed by the votes of a majority of the members of the National Assembly."*

[96] Consequently, the Appeals Court reasoned, though the President initiates the treaty implementation process by way of Article 64(3) of the Constitution, unless the National Assembly enacts a law or passes a resolution, a treaty will not be domesticated. Article 146 of the Commercial Code calls for reciprocity of signature or execution by the Executive and ratification of the Convention by the National Assembly. Similarly, Article 1(3) of the Convention allowed State Parties to ratify or sign the Convention subject to non-reciprocal treatment for non-State Parties. The Court went on to affirm that at the time of promulgation of the CC on the 1st January 1977 that Article 146 was fully operational, provided that the other transacting State was a member of the Convention- that is – until its renunciation and repudiation in 1979. To resuscitate this law the President would have to execute it and the National Assembly to ratify it.

[97] The Appeals Court then in paragraph 107 of that case stated that the court cannot have recourse to colonial treaties executed by the UK given the constraints of Article 64 of the Constitution and advised that the President and the National Assembly consider doing an evaluation of the Seychelles situation by ensuring that priority is given to execution and domestication of the relevant international instruments which are in our national interest, including the Convention. The Appeals Court proceeded to hold that the arbitral award was not enforceable in Seychelles, that is, that the Convention was not applicable to the Seychelles and accordingly, that articles 146 to 150 of the Commercial Code have no legal effect.

[98] The court cited the case of **Omisa Oil Management v Seychelles Petroleum Company Ltd (2001) SLR 50**, wherein it was stated:

"The enactment of articles 146 to 150 of the Seychelles Commercial Code Act as municipal law of Seychelles does not bind Switzerland to any degree or extent. The obligation of Switzerland under the Convention is only towards a State party to the said Convention and even then only to the extent that each state concerned has bound itself to apply the Convention. This is made explicit under articles III and XIV of the Convention (text found in Russell on Arbitration (20th ed) at p 504):"

[99] The court in the **Omisa** case found that Seychelles was not a contracting State to the Convention, that there was no mutual obligation in Switzerland and Seychelles with regard to the registration and enforcement of a Convention award or a non-domestic ward made in each other's jurisdiction. Therefore, it could not be said that there is a reciprocity between the two municipal jurisdictions. For these reasons the court found that the application for registration and enforcement of the foreign arbitration award made in Switzerland could not be granted in view of the lack of reciprocity between Switzerland and Seychelles in that respect and the application was accordingly dismissed.

[100] Therein ended the Parties' agreement. The Parties' point of departure stems from their interpretation of the effect of the coming into force of the Convention from 3 May 2020 on foreign arbitral awards in Seychelles. Vetiver argues that the accession fulfilled the requirement which the courts in both **Omisa** and which was affirmed in the **Vijay** case – which requirement was that the Convention, which had been made ineffective, was now, by virtue of the accession to the Convention, applicable. Thus the issue to be determined is whether a foreign arbitration award made in the territory of a state other than Seychelles and which is similarly a party to the Convention is registrable, and can be made enforceable and binding, under the relevant provisions of Articles 146 to 150 of the CC.

[101] The presumption would be that with the Convention coming into effect on the 3rd May 2020, and the Final Award granted on the 14th January 2021, that it should be recognised and enforceable in the Seychelles, as the obstacles of non-accession to the Convention

have been removed. The question is what did the Appeals Court mean by sections 146-150 being effective?

[102] I believe that Vetivert's view is the more correct of the two and finds favour with this Court. CESL's assertions that the ratification and accession to the Convention by the President and the National Assembly was only one of a two-step process and that the legislature has to enact the law domesticating Articles 146-150 of the Commercial Code is misguided. CESL states, in paragraph 16 of its submissions dated 10 October 2022 that:

> *"Given the dualistic system established by Article 64 of our Constitution, the completion of legislative process to give legal effect and force to international convention/treaty cannot predate accession to the said international convention/treaty."*

[103] Vetivert's argument presumes that Articles 146 -150 of the CC is none-existent. The question Vetivert's assertions raise are whether the communique sent to the UN Secretary General following independence dealt a *coup de grace* to Articles 146-150.

[104] The effect of the communique to the UN on these articles can be read from the wording of the Court of Appeal on the status of these provisions. In paragraph 41, the court in **Vijay** stated

"We find that with the repudiation of the Treaty Succession Agreement, all obligations and responsibilities of the Government of UK and Northern Ireland arising from any valid international instrument, which would have included the NY Convention, ceased to have effect. This repudiation resulted in the non-applicability of Articles 146-150 of the Commercial Code of Seychelles. Importantly, there is no evidence to indicate that Seychelles acceded to the said NY Convention thereafter."

[105] The above statement of the Appeals Court can be interpreted to mean that obligations and responsibilities arising from any valid international instrument became invalid, since the aspect of accession to such international treaty was removed. This means that acceding to those international instruments or ratification and accession to the treaties would restore

such rights, privileges, responsibilities and obligations as were prevalent before such accession. Hence the argument that by ratifying and acceding to the Convention on the 3rd February 2020, that on the date of coming into effect, all obligations and responsibilities would be restored. More so as these provisions were never repealed. Referring to the effect of accession to a convention the court in **Md v Bl (CA 26 of 2016) [2017] SCSC 196 (28 February 2017)**; held in page 6 paragraph 3:

> *"Seychelles acceded to the Hague Convention on the Civil Aspect of International Child Abduction in April 2008 and since then, we have seen its application in a number of cases before this Tribunal. Any uncertainty as to the legality and the effect of the Hague Convention in our jurisdiction was laid to rest in the case of Pragassen (supra) where the Learned Chief Justice held that "the convention imposes a duty on the authorities in Seychelles including the courts to facilitate the return of the child to the jurisdiction in which the child has residence.'*

Final Determination

[106] Therefore, as alluded to above, the relevant provisions relating to international arbitral awards have always been existent in our statute books, irrespective of the fact that such recognition and enforcement could not be attained, by virtue of the termination of Seychelles link to the all obligations and duties emanating from the NY Convention. Again, this proposition finds support from the Court of Appeal's reasoning in the **Vijay** case where in paragraph 70 the court stated:

> *"In the present case, although Article 227 of the Civil Procedure Code, discussing the NY Convention, and Articles 146-150 of the Commercial Code exist as law on the statute books, they cannot be enforced because of Seychelles' decision not to ratify the NY Convention."*

[107] The accession to the New York Convention by the Seychelles effectively brought to life the provisions of Articles 146 and 150 of the CC. The Court have no reasons to set aside the DIAC Final Award. The Court has determined that it has jurisdiction to hear the matter. I find no compelling reasons to interfere with the award.

[108] The application is therefore allowed and I order the validation moneys, held by the Public Utilities Corporation for the sum of US$286, 970.49, which has been provisionally attached further to an Order made by the Registrar of the Supreme Court dated 25 October 2021. I order the enforcement of the Arbitral award and that payment be made to VetiverTech (Proprietary) Limited. I order a summons to be issued to PUC at Maison Malavois, Bois de Rose to show cause why the said sum should not be paid to Vetivert.

M Vidot

Judge of the Supreme Court